

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

3 Case No. 16-75545-reg

4 - - - - - x

5 In the Matter of:

6

7 DOWLING COLLEGE

8

9 Debtor.

10 - - - - - x

11 Adv. Case No. 16-08178-reg

12 Zaikowski

13 v.

14 Dowling College

15 - - - - - x

16 United States Bankruptcy Court

17 Long Island Federal Courthouse

18 2290 Federal Plaza

19 Central Islip, NY 11722

20 February 6, 2017

21 2:10 PM

22 B E F O R E:

23 HON. ROBERT E. GROSSMAN

24 U.S. BANKRUPTCY JUDGE

25 ECRO: UNKNOWN

1 HEARING RE #152: Motion to Authorize/Direct debtor to return
2 Lion Statue given in memory of Christopher Karpowicz and return
3 any balance in the Christopher Karpowicz memorial scholarship
4 fund to the family

5

6 HEARING RE #179: Motion for 2004 Examination Pursuant to Rule
7 2004 of the Federal Bankruptcy Procedure, Authorizing the
8 Debtor to Examine Cigna Health, Life Insurance Company and
9 Healthplex, Inc.

10

11 Adv. Case No. 16-08178-reg:

12 HEARING RE #4: Summons and Notice of Pre-Trial Conference

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25 Transcribed by: Theresa Pullan

1 A P P E A R A N C E S :

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21 OFFICE OF THE UNITED STATES TRUSTEE

22 Long Island Federal Courthouse

23 560 Federal Plaza

24 Central Islip, NY 11722

25 BY: STANG YANG, ESQ.

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P R O C E E D I N G S

THE CLERK: Matter 62, Zaikowski v. Dowling College,
and matter number 63, Dowling College.

MR. SOUTHART: Good afternoon, Your Honor, Sean
Southart of Klestadt Winters Jureller Southard & Stevens on
behalf of --

THE COURT: I'm just fascinated about how these guys
are going to try to break up. Some of you can sit over there,
that's okay.

MR. SOUTHART: On behalf of the debtor, Dowling
College.

THE COURT: Okay.

MR. MCCORD: Good afternoon, Your Honor Richard
McCord [indiscernible].

MR. BERKOWITZ: Good morning, Your Honor, Adam
Berkowitz, Garfunkel Wild [indiscernible].

MR. WARMUTH: Glenn Warmuth, Stim & Warmuth on behalf
of Kim Poppiti.

MR. WISLER: Good afternoon, Your Honor, Jeffrey
Wisler on behalf of Cigna Health and Life Insurance Company.

MR. KLEINBERG: Good afternoon, Judge, Howard
Kleinberg, Meyer Suozzi for members of the board of directors,
trustees of Dowling.

MS. ROUPINIAN: Good afternoon, Your Honor, Rene
Roupinian and Jack Raisner on behalf of Lori Zaikowski from the

1 firm of Outten & Golden.

2 MR. FRIEDMAN: Good afternoon, Your Honor, Ronald
3 Friedman from SilvermanAcampora, counsel to the committee.

4 MR. YANG: Good afternoon, Your Honor, Stan Yang from
5 the United States Trustee.

6 THE CLERK: Please state your phone appearance.

7 THE COURT: Nobody?

8 THE CLERK: Please state your phone appearance from
9 Dowling.

10 MS. FARBER: Good afternoon, this is Peggy Farber
11 from the New York State Attorney General's Office.

12 THE COURT: Okay. That's it? Okay.

13 MR. SOUTHART: Good afternoon again, Your Honor, Sean
14 Southart for the record on behalf of Dowling College.

15 There are three matters on the calendar this
16 afternoon, Your Honor. We had filed an agenda last week, and
17 if agreeable to Your Honor, we would proceed in accordance with
18 the agenda.

19 The first matter on that agenda is the debtor's
20 motion for an order pursuant to Rule 2004 of the Federal Rules
21 of Bankruptcy Procedure authorizing the debtor to examine both
22 Cigna Health and Life Insurance Company and Healthplex, Inc.

23 Your Honor, this motion and the discovery sought
24 relates to claims associated with the terminated health and
25 dental plans that the debtor was party to prior to the petition

1 date.

2 We've talked with Your Honor at prior hearings about
3 some of the issues, and you've heard from some of the claimants
4 who have not had claims paid as a result of the termination of
5 those plans. And so we had attempted to get information on
6 behalf of the debtor from the discovery targets prior to filing
7 the motion.

8 We have one objection and a response by Cigna Health
9 and Life Insurance Company. Counsel is here on behalf of Cigna
10 today. And I will say that we have had some very productive
11 discussions on a counsel level both before that objection was
12 filed and after.

13 And I'm pleased to say that the parties believe they
14 resolved the discovery requests on an initial basis and have
15 prepared in essence an agreeable form of subpoena that Cigna
16 would respond to within 45 days providing the information that
17 it feels it's able to provide consistent with its obligations
18 and including in relation to privacy requirements that it is
19 bound by. And so the parties I think have worked in good faith
20 to resolve that.

21 We had presented that proposed form of order to
22 chambers by email on Friday. I hope that Your Honor had an
23 opportunity to review it. It's fairly basic in terms of the
24 revisions to the form of the proposed order. And it relates
25 only to Cigna because we did not receive any response from

1 Healthplex, and counsel only represents Cigna.

2 So with regard to Healthplex, Your Honor, the debtor
3 is requesting to go forward today with what is an unopposed
4 motion seeking --

5 THE COURT: What does that entity have?

6 MR. SOUTHART: I'm sorry, Your Honor?

7 THE COURT: What does Health, whatever it is, have?

8 MR. SOUTHART: Healthplex is the third-party
9 administrator in relation to the dental plan as opposed to
10 Cigna who is the administrator for the health care plan.

11 THE COURT: And both Cigna and the other entity are
12 merely administrators, neither of them have any obligation to
13 pay bills. Or is that --

14 MR. SOUTHART: As a general matter, yes, they're not
15 serving as an insurance company in relation to the -- they are
16 truly in a third party administer, they process the claims and
17 ultimately the debtor is responsible, Dowling was responsible
18 to pay the claims as a self-insured party under the plan.

19 THE COURT: And they self-insured to 100 percent of
20 the claims, or they had an insurance policy above the self-
21 insured?

22 MR. SOUTHART: I believe it's 100 percent, Your
23 Honor. There's some limited, I forget the exact phrase, stop
24 loss coverage that I believe exists under one of those
25 policies. But, by and large it's 100 percent.

1 THE COURT: And are the operations of these policies
2 under the auspices of either DOL or attorney general or
3 somebody? Or is everybody allowed to just self-insure with no
4 restraint?

5 MR. SOUTHART: I don't know the technical answer to
6 that question, Your Honor. But I will say that the U.S.
7 Department of Labor is interested in this termination and the
8 claims associated with it. They have opened an investigation.
9 That investigation was opened prepetition, and the debtor has
10 been supplying the U.S. Department of Labor with information
11 responsive to their request.

12 THE COURT: Yeah, I'm just curious because I've seen
13 some letters to me and other things, pleadings, but a lot of
14 letters. Monies were either deducted or I guess deducted from
15 employees or others at Dowling on a monthly basis. And that
16 pool formed the basis for the self-insured pool. Correct?

17 MR. SOUTHART: Deductions as well as contribution by
18 Dowling itself.

19 THE COURT: Okay. So you had a pool of money in
20 theory. You have a pool of money whether it came from the
21 deduction that they credited, that they put in, or money they
22 collected. So there's a pool of money. Those funds are
23 maintained in a trust account, a separate account? How -- do
24 we know?

25 MR. SOUTHART: They were not -- my understanding is

1 they were not maintained in a separate trust account nor --

2 THE COURT: How were they supposed to be?

3 MR. SOUTHART: Nor were they required to be.

4 THE COURT: Okay. So you're saying that an entity
5 can have a self-insured program, collect money and take money
6 from its workers and comingle those funds with operating funds?
7 I don't know, I'm just asking.

8 MR. SOUTHART: I'm not saying that. I was answering
9 your question. The details of this, Your Honor, I'm not
10 personally privy to it.

11 THE COURT: And I don't suspect, I think this is
12 going to be a long journey to figure this one out. But all I'm
13 trying to do is make sure nothing I do now with regards to the
14 agreement you have with Cigna in any way impedes, interferes,
15 challenges, waives the rest of this conversation. I don't
16 think it does, but I just want to make sure of that.

17 MR. SOUTHART: Yeah, I appreciate Your Honor's
18 concern. I don't believe it does either.

19 THE COURT: All right.

20 MR. SOUTHART: In particular, the agreement that is
21 reached and memorialized in that agreed form of order does
22 provide the debtor with the ability to notice up the motion and
23 pursue additional requests for discovery under bankruptcy rule
24 2004.

25 THE COURT: And it doesn't require that the documents

1 be kept -- does it require, I don't remember whether you are
2 permitted -- if someone subpoenas the documents from the
3 debtor, are you restrained from turning those documents over?
4 In the agreement. You may have other reasons, but in the
5 agreement.

6 MR. SOUTHART: If there's no formal statement as to
7 our response to a subpoena in the form of order, there is
8 contemplated that the debtor will take reasonable steps to
9 protect privacy of the information that will be provided to it.
10 So I would envision under that scenario if the party issuing
11 that subpoena was some entity that the debtor felt should not
12 be entitled to the information they were requesting from --

13 THE COURT: I just want to make sure I can stop the
14 distribution of those documents if I feel they impinge on
15 personal information that shouldn't be out there. I'm not
16 worried about --

17 MR. SOUTHART: I understand.

18 THE COURT: Period. So the order is going to reflect
19 somehow if it's not in there now, that the debtor will have an
20 opportunity, in fact the responsibility to remain the privacy
21 of these folks. The economic fight is one thing, but we're not
22 going to have medical records of people floating around in a
23 bunch of lawsuits.

24 MR. SOUTHART: Understood, Your Honor.

25 THE COURT: Does anybody want to be heard on this?

1 Okay. So -- oh yeah, come on up. Just tell me who you are.

2 MARIELLE: My name is Marielle [indiscernible] of
3 Dowling College. I just wanted to mention in the questions
4 that you had asked, most of the employees that have outstanding
5 claims they're backed up to almost December. I think the
6 employees find it a little disturbing that Dowling College
7 doesn't have a record of any of those claims for such a long
8 period of time. We have employees that have had surgeries that
9 were preapproved, dental procedures that were preapproved that
10 are not being paid.

11 The employees that were responsible, the HR Director,
12 and the CFO that were responsible for paying Cigna the monies
13 that apparently are outstanding and the monies that were
14 withdrawn from our salaries, are still working at the college,
15 and it's very discouraging to the employees.

16 THE COURT: I think just, I don't want to cut you off
17 but, there's going to be a lot of things in cases like this
18 that seem illogical and become very disturbing to people.
19 Hopefully we'll be able to sort it out to put some reasoning to
20 it as the long prescribes. Whether that gets you a
21 satisfactory answer or not, I can't answer now. But all of
22 these people and the Court will endeavor to get all the people
23 who have rights whatever rights they have, they can't
24 manufacture money, but just going to have to let it unfold.

25 MARIELLE: Okay.

1 THE COURT: There is a proposed action which I guess
2 I'll be asked to turn into a class action at some point or not,
3 trying to cover a number of these issues. Who the parties are
4 that are responsible, I don't know. Where did the money come
5 from? I don't know. Depends on what the sales bring of the
6 properties.

7 So you're going to be noticed of these hearings, you
8 can show up, it's your right, I'll let you speak, and we'll see
9 if we can sort it out. Again, I can't guarantee you're going
10 to like the answers, but we'll get you the answers.

11 MARIELLE: Appreciate that. Thank you.

12 THE COURT: All right. I'm going to grant -- well
13 actually you're going to do a stipulation with Cigna. Or I
14 have a proposed order.

15 MR. SOUTHART: You do, Your Honor.

16 THE COURT: All right. We'll enter that proposed
17 order. And with regards to the other company, we're going to
18 enter the order you originally submitted.

19 MR. SOUTHART: Thank you, Your Honor.

20 THE COURT: Yes, that's what we'll do there. Okay.

21 MR. SOUTHART: Thank you. The next item on the
22 calendar this afternoon, Your Honor, is a motion by Patricia
23 Karpowicz to authorize the debtor to return a lion statue given
24 in memory of her son, Christopher Karpowicz and to return any
25 balance in the Christopher Karpowicz memorial scholarship fund

1 to the family.

2 Your Honor, the debtor did file a response.

3 THE COURT: I understand. You're going to give them
4 back the statute, you don't have any money left.

5 MR. SOUTHART: That's correct, Your Honor.

6 THE COURT: And the parties have agreed that that's
7 where you are.

8 MR. SOUTHART: That is correct, Your Honor.

9 THE COURT: And Ms. Karpowicz and/or her family will
10 be responsible to remove the statue.

11 MR. SOUTHART: Correct, Your Honor. And we'll make
12 arrangements along those lines to everyone's mutual
13 satisfaction.

14 THE COURT: And right. Now it's being protected so
15 nothing is happening to that?

16 MR. SOUTHART: Correct, Your Honor.

17 THE COURT: All right. We'll grant that motion.

18 MR. SOUTHART: Thank you, Your Honor.

19 Then the final matter on the calendar this afternoon
20 is the pretrial conference in relation to Lori Zykowski
21 [phonetic] claim brought as proposed class representative to
22 various similarly situated employees who were terminated by
23 Dowling prior to the petition date.

24 The claims in this complaint are focused on the
25 Warren Act and related notices that they assert were required,

1 and ultimately claims up to 60 days worth of benefits and wages
2 associated with what they allege was a failure to give proper
3 Warren Act notice.

4 Your Honor, the debtor has filed an answer and
5 asserted various affirmative defenses. The parties have
6 conferred by phone about how they see the case, the claims, the
7 defenses in general terms. There is a view, a general view
8 that we're not yet sure whether these claims if they were to be
9 allowed are in the money so to speak and the parties I think
10 recognize that this is potentially the type of claims that
11 could be resolved through settlement discussions and
12 potentially mediation.

13 And so in essence what the plaintiff would like to do
14 is proceed with its class certification efforts and then the
15 parties would exchange some initial discovery.

16 THE COURT: The first step is we either have to
17 certify it or not, because I've got to know who are the parties
18 to any action, who's speaking for whom.

19 MR. SOUTHART: Yes, Your Honor. And the debtor
20 desires the same clarification. And although generally
21 speaking we think it may be helpful to an efficient resolution
22 for these matters to be brought up in a class way. So we have
23 agreed on a form of pretrial order that was circulated to
24 chambers again on Friday. It provides for that class
25 certification to take place initially.

1 THE COURT: Make sure to take a look at Judge
2 Weinstein. He just issued a decision on class actions.

3 MR. SOUTHART: Will do, Your Honor.

4 THE COURT: With all due respect to the Supreme
5 Court, I find Judge Weinstein much more helpful.

6 MR. SOUTHART: We shall do that. So, Your Honor, I
7 can take you through if you like, and you haven't had a chance
8 to review it, the proposed dates.

9 THE COURT: Well I looked through it. The only,
10 we're going to issue or enter a form order that we use relative
11 to mediation which means you guys get a minimal amount of time
12 to choose somebody, I don't generally make you choose anybody
13 within a certain pool, you choose anybody that you both agree
14 with.

15 But if you don't within that period of time, I'll
16 appoint somebody and you all will be responsible for paying
17 that person. But the Court -- I don't let, I don't do a lot of
18 mediation, and the last thing I do is let the selection of a
19 mediator go on for months. I've never quite understood that.
20 But it's premature until we resolve class certification issue.

21 In this case I think it works much better, I think
22 geographically it will work, question-wise it'll work, the main
23 issue. I think counsel, proposed counsel, have expertise in
24 this area. So I'll look at the papers, but I had a couple of
25 others where sometimes objection to claim process, especially

1 in a bankruptcy works as well or better, but not this one. My
2 initial take, but I'll look at everybody's position.

3 I know Judge Lifland always used to try to counsel us
4 to not do classes, but I think in certain types of cases, it
5 makes sense. And then if we can get that done quickly, you can
6 get to your mediation. And the goal here is to get folks, at
7 least get them to know if they're going to get -- they might
8 not get any money. But there also, there's going to be a
9 pocket of money. How that money is whacked up, may be the
10 subject of some debate.

11 MR. SOUTHART: Understood, Your Honor.

12 THE COURT: All right. I'll just wait on that.
13 We'll sign -- you have a proposed, the order you gave me has
14 class certification going in front of me when?

15 MR. SOUTHART: On or before March 10, Your Honor.

16 THE COURT: All right.

17 MR. SOUTHART: And then mediation commencing
18 thereafter to be completed no later than July 10.

19 THE COURT: All right. The sale of the Oak Dale
20 property will be done by then.

21 MR. SOUTHART: Indeed it will, Your Honor.

22 THE COURT: So we'll know something about where the
23 world is going to be.

24 All right. We'll grant that.

25 MR. SOUTHART: Thank you, Your Honor.

1 Your Honor, that concludes the matters on the
2 calendar for today. Just in terms of a couple of other items
3 to mention to Your Honor. The bar date obviously was set and
4 noticed, was given broadly including by publication. The
5 debtor and I think the committee have received a number of
6 calls and questions in the typical order of things, and those
7 are being responded to timely.

8 Your Honor, there have been discussions I understand
9 between the DIP lenders and the committee in relation to their
10 differing views on certain value items and I'm sure counsel can
11 speak to that for the committee.

12 THE COURT: What are we doing with the restricted
13 funds accounts? You guys figure that out yet?

14 MR. SOUTHART: Your Honor, we filed an initial report
15 as we were required to do by the terms of the cash management
16 order that Your Honor entered on the first day of the case.
17 And we continued to try to identify some more details about
18 those, a couple of those accounts in question. We have
19 generally satisfied ourselves on the debtor's side that the
20 largest of those funds which is the endowed scholarship funds
21 are properly restricted and will ultimately require some
22 additional non-bankruptcy relief about the ultimate disposition
23 of those funds.

24 THE COURT: Where do they go?

25 MR. SOUTHART: Well, Your Honor, the New York City

1 Attorney General's office, the charities bureau which is
2 charged with in essence looking out for the best interest of
3 the state of New York is responsible for giving its views and
4 in essence policing the disposition of excess --

5 THE COURT: You don't get to select where it goes.
6 Or do you?

7 MR. SOUTHART: Your Honor, the debtor would be able
8 to have standing to make a suggestion about where funds would
9 go. In the typical order of things, the Attorney General's
10 Office likes to try to find an alternative home for those funds
11 where the charity in question has a similar mission to that of
12 the debtor entity. So what I would envision ultimately
13 happening is that another college, probably a local college
14 might well be the beneficiary of those endowed scholarships.

15 THE COURT: But they don't become general operating
16 funds to go to creditors.

17 MR. SOUTHART: They do not, Your Honor. They do not.

18 THE COURT: Okay.

19 MR. SOUTHART: And that's a subject matter that has
20 been discussed pretty extensively with the New York State
21 Attorney General Office. Ms. Barber I believe is on the phone
22 today, and we will continue to discuss those matters and
23 provide the attorney general's office with information they
24 request.

25 THE COURT: All right. One other question. On the

1 sale process, I'm deluged to some degree with copies of the
2 same thing which is what the sale is as well as large numbers
3 of people, probably folks who live in that area and have their
4 own views on what should happen. Property is being sold with
5 the presumption that it's free and clear of what?

6 MR. SOUTHART: Any and all claims and encumbrances,
7 Your Honor. I think what the civic groups are concerned
8 about --

9 THE COURT: Somebody apparently went in front of --
10 which town is this?

11 MR. SOUTHART: This is Islip, Your Honor.

12 THE COURT: I don't think it was the town of Islip.
13 They tried recently to have the facility declared a historical
14 or monument or something, which when we saw it we questioned
15 whether or not that in and of itself caused problems whether it
16 was a violation of the stay. Now, I don't believe the town did
17 anything, but it's important that we, you all understand what's
18 going on there.

19 MR. SOUTHART: Yes, Your Honor, that's actually one
20 of the other items I was going to bring to your attention. The
21 debtor has met with the town of Islip recently, and with given
22 an indication that the town does intend to proceed with a
23 designation of at least the mansion, the Vanderbilt mansion, at
24 the Oakdale campus there are some other buildings that they are
25 considering that designation. And the debtor and its advisors

1 are investigating the applicability of the stay, and
2 discussing --

3 THE COURT: Mr. McCord is an expert on these things
4 at this point.

5 MR. SOUTHART: Discussing some of the options that
6 may exist. I think the town discussions have been productive,
7 and you know the debtor desires and I think all the creditors
8 that have an interest in that property have a desire certainly
9 to maximize the value and recognize that the town does have a
10 role to play in the development of that property. So all the
11 parties are talking I think in a collegiate way and hopefully
12 we won't be in front of Your Honor requesting any relief in
13 that respect.

14 THE COURT: That's my goal.

15 MR. SOUTHART: Mine as well, Your Honor.

16 THE COURT: We can resolve this without me having to
17 determine what happens to that facility.

18 MR. SOUTHART: It is an unusual circumstance that
19 frankly I've not seen before with the designation.

20 THE COURT: It's, the oddity is I have two cases
21 against the town [indiscernible] Huntington along the same
22 kinds of lines what towns can do and not do. And if you all
23 can stay ahead of that, it will be very helpful.

24 MR. SOUTHART: Yes, Your Honor. We are trying to.

25 THE COURT: Anybody want to be heard on anything?

1 MR. FRIEDMAN: Briefly if I may, Your Honor. We have
2 the committee, both Mr. Southart in his office and Mr.
3 Rosenfeld in his office have been very cooperative and
4 collaborative with access to information. We're trying to get
5 as many things done informally as we can so as not to burden
6 the courts or drive up any unnecessary administrative expense
7 fees. WE have had some extensive discussions with counsel to
8 the DIP lenders as recently as Friday and I wanted to at least
9 report to the Court that we believe in a matter of days not
10 weeks, but days, we should have the form of some kind of
11 proposal that the parties can hopefully put pen to paper on in
12 a more aggressive fashion to negotiate into a closure with a
13 goal to have an in-person meeting at least amongst counsel
14 between the committee and DIP lenders and certainly the CEO and
15 debtor's professionals either at the end of February, the first
16 week of March, so by the time we're back here on March 14th,
17 we've gotten all of that moved off into running around the
18 track the way it's supposed to be.

19 Secondarily, with respect to some of the committee's
20 informal investigation and an inquiry into the prefiling
21 operations of the college and certainly related to the board of
22 directors. Had a discussion today with Mr. Kleinberg but I've
23 also previously discussed with the CEO and counsel for the
24 debtor getting access to some of the information that they have
25 in lieu of having to file a separate 2004 subpoena, and I

1 believe that that informal discovery will continue on a
2 parallel track with the sale process and hopefully yield some
3 benefit as well at least for information purposes if nothing
4 else.

5 THE COURT: Okay. All right. Okay. You guys came
6 all the way out. Do you want to say anything or are you happy
7 with where you are?

8 UNIDENTIFIED: [indiscernible]

9 THE COURT: You don't have to. You're ahead of the
10 game right now, so you can only go backwards.

11 UNIDENTIFIED: And the best advice is to sit down.

12 THE COURT: Someone taught me that 25 years ago. We
13 need a date.

14 MR. SOUTHART: Your Honor, I believe we have March 14
15 for the DIP hearing, but we were under the impression that's
16 the only item that can be on the calendar for that date.

17 THE COURT: The sale is supposed to take place on the
18 -- no?

19 MR. SOUTHART: The bids are due, Your Honor, on the
20 27th of March.

21 THE COURT: Okay. So the sale won't take place for a
22 while. All right. So the 14th?

23 MR. SOUTHART: We have a sale approval hearing
24 reserved for April 10th.

25 THE COURT: If we don't have to do anything on March

1 14th, I'll let you just come back in April. Do you think we're
2 going to have to be fighting about the DIP in March?

3 MR. SOUTHART: I certainly hope not, Your Honor.

4 THE COURT: All right. Leave the March date. If you
5 don't need it, let us know and we'll move you out until April.

6 MR. SOUTHART: Okay.

7 THE COURT: So whatever else is on, we'll adjourn to
8 that date. You guys are going to do the certification, you're
9 going to move ahead on that and see what we can do with that?
10 Okay. Thank you.

11 ALL: Thank you, Your Honor.

12 (Proceedings concluded at 2:41 PM)

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CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a
correct transcript from the official electronic sound recording
of the proceedings in the above-entitled matter.

Theresa Pullan

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